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California Department of Corrections and Rehabilitation
Regulation and Policy Management Branch
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RE: Public Comment on Proposition 57 Regulations

In November, California voters enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016, making any person convicted of a nonviolent offense and sentenced to state prison eligible for parole after completing the full term of his or her primary offense. In the months following the passage of Proposition 57, the California District Attorneys Association (CDAA) communicated the concerns of prosecutors to those tasked with drafting the administrative regulations outlining the process for early release. Six key concerns still exist with the proposed regulations: (1) CDCR's definition of "nonviolent offense" when considering an inmate's eligibility for parole; (2) the definitions of "primary offense," "full term," and "nonviolent parole eligibility date" are inconsistent; (3) victims are not allowed to submit confidential statements; (4) the timeframe for prosecutors to submit written statements to the board is not sufficient; (5) prosecutors are unable to review inmates' central file; and (6) prosecutors are unable to request review of grants of parole.

DEFINITION OF "NONVIOLENT OFFENSE"

With the passage of Proposition 57, article 1, section 32(a)(1) of the California Constitution now states, "Any person convicted of a *nonviolent offense* and sentenced to state prison shall be eligible for parole after completing the full term of his or her primary offense. (Emphasis added.) Title 15, division 2, section 2449.1(b)(1), and division 3, section 3490(b)(1) and (2) of the regulations impermissibly expand the definition of a "nonviolent offender" to include inmates who have completed a term for a violent offense under Penal Code section 667.5(c) and are now serving a determinate term for a "nonviolent offense," thus turning violent offenders into "nonviolent" inmates in order to qualify them for early release. This circumvents the intent of Proposition 57 and what the voters believed they were voting for.

INCONSISENT DEFINITION OF OTHER TERMS

In the regulations, "primary offense" is defined as the single crime with the longest sentence imposed by any court, excluding all enhancements, alternative sentences, or consecutive sentences. "Full term" is the actual number of years, months, and days the sentencing court imposed for that primary offense, *not including sentencing credits.* (Emphasis added.) "Nonviolent parole eligible date" is the date on which an inmate who qualifies as a nonviolent offender has served the full term of his or her primary offense*, less pre-sentence credits applied by the sentencing court for time served under Penal Code section 2900.5* and any time spent in custody between sentencing and the date the inmate is received by the department. (Emphasis added.)

It is inconsistent to state in the definition of "full term" that sentencing credits are not included, and then to include pre-sentence credits when determining the nonviolent parole eligible date. An inmate must serve the "full term" on the "primary offense" before becoming eligible for early release, so it is inconsistent with that intent to determine that an inmate is eligible for early release prior to serving the "full term" by including pre-custody credits in that calculation. The regulations need to be clarified to ensure an inmate serves every actual day of his or her term on the "primary offense" before becoming eligible for early release.

CONFIDENTIAL STATEMENTS

Subsection 2449.2 addresses notice of the hearing to registered victims of the crime, but it does not provide a method for a victim to submit a confidential statement to the board. This is a glaring omission in the proposed regulations. Many victims live in fear of their offender. This is recognized in life parole suitability hearings, where victims and their next of kin can submit confidential letters. Without the ability to submit a confidential statement in a Proposition 57 hearing, victims are effectively deprived of their constitutional right "to be heard, upon request, at any proceeding, including any delinquency proceeding, involving a post-arrest release decision, plea, sentencing, post-conviction release decision, or any proceeding in which a right of the victim is at issue." (Cal. Const. art. 1, subd. (b)(8) and Proposition 9 [Marsy's Law].) Proposition 57 made sweeping changes to victims' rights, but a victim's right to be heard remains. It is important that this constitutional right is not compromised.

PROSECUTOR TIMEFRAME

Title 15, division 2, subsection 2449.2(a)(1) states that the board shall notify the prosecuting agency of the inmate's pending nonviolent offender parole consideration and provide an opportunity to submit a written statement. Subsection (a)(2) requires the responses to be in writing and postmarked or electronically stamped no later than 30 days

after the board issues the notice. Section 2449.4(b) and (c) sets out the factors the hearing officer shall consider when conducting a review on the merits. These include the circumstances surrounding the current conviction and the inmate's prior criminal history. The 30-day response time does not allow the prosecuting agency sufficient time to obtain the files, arrest reports, prior convictions, and other relevant documents, review all the materials, and prepare written statements to assist the board in making informed decisions about each inmate being considered.

The stated purpose for subsection 2449.4(b) is "to ensure that hearing officers have access to all of the above information for their consideration when determining whether parole is appropriate for nonviolent offenders." The purpose for subsection 2449.4(c) is to "ensure that the hearing officer makes a fully informed decision when considering parole." (Initial Statement of Reasons NCR 17-05, page 22 of 48.) Proposition 57 amended the California Constitution to specifically require CDCR to adopt regulations in furtherance of the Act, and states the Secretary of CDCR shall certify that these regulations protect and enhance public safety (Cal. Const., art. 1, § 32, subds. (a)-(b).) In order to truly protect public safety, the regulations need to allow ample time for the prosecuting agency to provide the hearing officer with all relevant information this critical decision will be based upon.

In addition, errors have been discovered in some of the notices that have already been received, including notices being sent to the wrong county and incorrect information on the abstract of judgment affecting the inmate's eligibility. The 30-day timeframe is not sufficient to discover and rectify these errors.

Finally, many of the victims of the inmates who are being reviewed for early release had no idea they would need to register as victims with the Office of Victim and Survivor Rights and Services in order to be notified about parole hearings, because their expectation was that their offender would never be considered for parole. CDCR's position is that they will only notify registered victims of upcoming hearings, so prosecutorial agencies need more time to locate and inform victims of their right to participate in the hearing process.

CDAA is requesting the regulations allow a minimum of 90 days for prosecutors to provide written statements to the board and to locate victims who are not registered with CDCR.

ACCESS TO CENTRAL FILE

The proposed regulations do not allow for prosecuting agencies to conduct a review of the inmates' central file in order to be fully informed when evaluating their position on early release. Without access to the central file the prosecuting agency is being required to issue an opinion on release without critical information as to the inmate's programing and conduct in prison. Subsection 2449.4(b) states the hearing officer conducting a review on the merits shall review the inmate's central file and consider the inmate's institutional

behavior including both rehabilitative programming and institutional misconduct. The Initial Statement of Reasons NCR 17-05, page 22 of 48, states subsection (b)'s requirement that hearing officers must consider all relevant and reliable information when considering parole for a nonviolent offender. It further explains that this mirrors the requirements found in sections 2281 and 2402, applicable to parole suitability hearings for life inmates. In life parole suitability hearings, the prosecuting agency is allowed access to the inmate's central file in order to prepare for the hearing and to be able to give a fully informed opinion as to release. Proposition 47 also provides the prosecuting agency access to conduct a review of the inmate's central file in order to prepare for the hearing. Without access to the central file the prosecuting agency is unable to assist the hearing officer by providing relevant information and a unique perspective on the links between the inmate's past behavior and current behavior and/or programming while in custody. Without access to the central file, when the victim of the crime, the arresting agency, the public, or the news media asks how the inmate is performing in custody, prosecutors will be forced to tell them CDCR will not allow access to that information, so we are unable to fully inform them or evaluate our positon on release. In an era where transparency in the criminal justice system is demanded, prosecutors need to have a clear picture of an inmate's behavior in prison prior to taking a position on his or her release back into society.

LACK OF REVIEW OF GRANT OF PAROLE

Subsection 2449.5 provides a process for the inmate to have a denial of parole reviewed. It does not allow the prosecuting agency to request a review of a grant of parole. In a system in which one of the stated goals is to ensure public safety, the prosecuting agency should have the same rights as the inmate to request a review of the board's decision. In the words of Justice Cardoza, "Justice, though due to the accused, is due to the accuser also."

The regulations are silent as to when an inmate who is denied parole on a review of the merits will be rescheduled for another review. Subsection 2492(d) states that if an inmate is not eligible for a referral for a review on the merits, the inmate shall be screened again one year from the date of his or her last public safety screening. The regulations need to address this issue.

Prosecutors serve the public interest by increasing public safety and honoring victims' rights. As stakeholders in the Proposition 57 parole process, we ask that our concerns with the regulations as drafted be seriously considered and addressed.

Very truly yours,

Todd D. Riebe
President